IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	**CRIMINAL ACTION**
v.	
JAKE KELLY	**NO. 04-605**

DuBois, J. **July 27, 2017**

M E M O R A N D U M

On May 1, 2004, the Philadelphia Police Department conducted an "open inspection" of the bar Café Breezes to assure proper licensing and to check for underage drinking and narcotic sales. During that inspection, Officer Donna Stewart reportedly witnessed a gun fall from movant Jake Kelly's lap onto the bar floor. Based almost exclusively on Stewart's testimony and following a jury trial for which Kelly's trial counsel did not call a single witness, Kelly was convicted of possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(e). This Court sentenced Kelly, *inter alia*, to the mandatory minimum sentence of 180 months of imprisonment.

After an unsuccessful appeal, Kelly filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, on April 16, 2012, raising four ineffective assistance of trial counsel claims, including a claim that trial counsel failed to properly investigate potential witnesses. Those claims were all denied. Kelly appealed that ruling, and the United States Court of Appeals for the Third Circuit Court reversed the Court's denial of Kelly's ineffective assistance of counsel claim for failure to properly investigate and remanded the case for further proceedings.

On remand from the Third Circuit, this Court must decide the one remaining claim—whether trial counsel failed to conduct a reasonable investigation which "would have led trial

counsel to learn" that a man seated next to Kelly, Victor Jones, threw the gun at Kelly. Based on the limited investigation by trial counsel and the weak nature of the evidence presented against Kelly at trial, the Court concludes that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." For the following reasons, the Court grants Kelly's Motion, vacates his conviction and sentence, and orders a new trial.

I. BACKGROUND

The Court first recounts the evidence presented at Kelly's trial and then discusses the evidence and testimony provided during the post-trial proceedings.

A. Trial

The following evidence was presented to the jury at trial. On May 1, 2004, the Philadelphia Police Department conducted a routine "open inspection" of Café Breezes, to check for underage drinking, narcotics sales, and proper licensing. Trial Tr. July 20, 2005 ("Trial Tr. 7/20/05") at 30:17-19; 31:12-25. During open inspections, patrons are not automatically searched for weapons or other contraband. *Id.* at 35:9-13. Instead, as with the inspection on May 1, 2004, undercover officers are sent in prior to the inspection to determine if any illegal activity is occurring. *Id.* at 40:12-17.

In the early morning of May 1, 2004, two undercover officers entered Café Breezes and seated themselves at the bar. *Id*. at 73:22-25, 74:1-5. The floor plan of Café Breezes is narrow and long, and the bar itself is shaped as a backwards "L" with the short side of the bar located at the front of the building. *Id.* at 73:1-6. Kelly was seated at the short end of the bar at the corner of the "L." *Id.* at 73:7-12. Two female patrons were also seated on the short end of the bar, to Kelly's left. *Id.* at 73:14-21. A male patron, Victor Jones, was seated to Kelly's right, at the first

seat on the long end of the bar. *Id.* at 73:22-25, 74:1-2. The two undercover officers were seated immediately to Jones's right. *Id.* at 74:3-5.

After the undercover officers monitored the bar for a period and discovered no illegal activity, *id.* at 39:25, 40:1-3, approximately nineteen officers entered as part of the open inspection team, *id.* at 36:14-19. As part of that entry, uniformed officers entered the bar first. *Id.* at 38:3-11. Corporal Ray Drummond followed those uniformed officers in and announced that the officers were conducting an open inspection. *Id.* at 38:14-21. Also on the open inspection team was Officer Donna Stewart. *Id.* at 70:4-7.

Stewart positioned herself at the front of the bar, between the short portion of the bar and the front door. *Id.* at 74:6-9. Stewart stated that she "noticed [Kelly], he was looking around, kept looking over his shoulder" and "looked in [her direction]" and "in the direction of the door." *Id.* at 75:1-5. She noticed that he "started to sweat" and "was fidgeting on his barstool." *Id.* at 75:7-8. Stewart then walked over to her partner, Officer Brant Miles, for a period of "maybe ten seconds," in a different area of the bar to report that Kelly was making her nervous. *Id.* at 75:16-19, 102:3-7. Stewart testified that, despite Kelly's conduct making her nervous, she turned her back to him to walk away. *Id.* at 103:5-9. However, she maintained that Kelly could not have done anything during that period of time. *Id.* at 103:5-9.

Miles testified at trial that he had no specific recollection of a conversation with Stewart about safety concerns prior to Kelly's arrest. *Id.* at 158:22-25, 159:1-2. Stewart also did not mention Kelly's "nervous" behavior in the 75-48 "Complaint or Incident Report" or the "Memorandum" that she completed following the arrest. *Id.* at 96:16-21. During a preliminary hearing prior to trial on May 10, 2004, Stewart did not testify that Kelly acted nervous or was fidgeting. *Id.* at 96:22-25, 99:6-11.

Following her conversation with Miles, Stewart returned to the front of the bar and positioned herself behind Kelly and slightly to his left. *Id.* at 103:10-16. Stewart stated that Kelly was "crunched over in his seat with his hands below the bar where I couldn't see them and he had stopped fidgeting." *Id.* at 76: 19-24. Those details are not included in either the "Complaint or Incident Report" or the "Memorandum." *Id.* at 96:16-21.

To reposition herself to Kelly's left, Stewart was required to walk up to and behind Kelly. *Id.* at 108:10-12. Stewart stated that she "was keeping [her] eyes on him" as she did so but did not see anything on Kelly's lap. *Id.* at 108:19-20, 109:1-5. After standing behind Kelly for a few moments, Stewart moved back to the front of the bar. *Id.* at 110:19-22, 111:8-11. While Stewart was stationed at the front of the bar, an officer farther down the bar asked a patron for his or her identification. *Id.* at 77:15-20. Kelly reportedly stated "I have mine," drawing Stewart's attention back to him. *Id.* at 111: 23-25. On direct examination, Stewart testified: "It was at that point that [Kelly] reached quickly towards his back." *Id.* at 77:20-22. On cross-examination, Stewart stated that Kelly "reached to his –his waistband." *Id.* at 111:23-25. Based on that movement, Stewart stopped him and had Kelly put his hands on the bar. *Id.* at 77:22-23. She moved back over, behind and to the left of Kelly, and ordered him to stand. *Id.* at 77:23-25. According to Stewart as Kelly "stood up the gun fell from his lap, it was about mid-thigh. It fell down his left leg, it hit the brass chair rail at the base of the bar with a loud metal clang and then it landed on the floor." *Id.* at 78:1-4. Miles testified that he "heard a thud" from about halfway down the bar. *Id.* at 160:16-19. However, Miles also acknowledged that he had never told anyone prior to his trial testimony that he heard a thud, *id.* at 161:1-4, and did not see Kelly with a firearm, *id.* at 161:15-17.

Stewart then yelled "gun" and other officers "rushed up towards" her. *Id.* at 78:5-6. While those officers handcuffed Kelly, Stewart recovered the gun from the bar floor. *Id.* at 78:5-7. Two female patrons, seated to Kelly's left, were not asked for their name or identification. *Id.* at 116:12-20. Stewart testified that she "[didn't] know if they were—if they saw." *Id.* at 116: 1-2. The male patron seated to Kelly's right, later identified as Victor Jones, was also not asked for his name or if he had any useful information. *Id.* at 116:21-25, 117:1-9.

No officers, other than Stewart, or patrons connected Kelly to the gun. The Government presented no forensic or other evidence to tie Kelly to the weapon. The defense case presented by Kelly's trial counsel consisted of moving into evidence one photograph, two police reports, and the preliminary hearing transcript which trial counsel had used during cross-examination of a Government witness. On July 21, 2005, the jury returned a verdict of guilty.

B. Motion for New Trial

On August 1, 2005, newly retained counsel Mark E. Cedrone entered an appearance for Kelly. On the same date, Kelly filed a counseled Motion for New Trial and Leave to Supplement pursuant to Federal Rule of Criminal Procedure 33(a). By Order dated August 3, 2005, this Court granted Kelly leave to supplement his Rule 33 Motion. On October 6, 2005, Kelly filed a Supplemental Motion for New Trial, which included new grounds for Kelly's Motion for New Trial under Federal Rule of Criminal Procedure 33(a) and a Motion for New Trial under Federal Rule of Criminal Procedure 33(b) based on newly discovered evidence.

In support of his Motion, Kelly attached a statement by Kemahsiah Gant — a friend of Kelly's girlfriend, Jacqueline Cephas. In that statement, Gant recounted her conversation with her friend, Victor Jones, about the gun that Kelly was convicted of possessing. According to Gant, Jones admitted that, during the early hours of May 1, 2004, at Café Breezes, he "had the

gun" at issue and that he, not Kelly, threw it on the floor when the police entered. Def.'s Supplemental Post-Verdict Mots., Ex. A. The Court held an evidentiary hearing on Kelly's claim of newly discovered evidence on June 8, 2006.

At the evidentiary hearing, Jones testified, as did Kemahsiah Gant; Kelly's girlfriend, Jacqueline Cephas; and Philadelphia Police Officer Clarence Clark. As the credibility of Jones's testimony is central to the determination of Kelly's Motion, the Court discusses Jones's testimony in some detail below and the relevant portions of Gant's and Officer Clark's testimony.

1. Testimony of Kemahsiah Gant

Gant testified that sometime in late July 2005, after Kelly was convicted, Gant and Jones had a conversation in which Jones admitted to Gant that the gun the police seized in Café Breezes did not belong to Kelly. Specifically, Gant stated at the hearing that she told Jones that Kelly had been convicted and sentenced for possession of a gun, after which Jones paused and said, "I have something to tell you." Hr'g Tr. June 8, 2006 ("2006 Hr'g") 27:12-15. According to Gant, Jones's "exact words" were that "it wasn't Jake's gun," and that "he [Jones] had the gun and threw it on the floor" of the bar when the police entered because he was nervous. *Id.* at 29:21-23, 52:3-10. Gant further testified that Jones "didn't get into details of the incident, period." *Id.* at 53:3-5.

About three weeks later, Gant told Kelly's girlfriend, Jacqueline Cephas, about her conversation with Jones. *Id.* at 30:23-25, 31:6-10. Cephas asked Gant to speak to Kelly's attorney, but Gant refused because she did not want to get involved with the case. *Id.* at 34:14-25. Gant later changed her mind and spoke with an investigator from defense counsel's office. *Id.* at 35:1-7. Gant provided the investigator with a written statement in which she said that

Jones told her the gun the police found did not belong to Kelly, that Jones "had the gun," and that when the police came into Café Breezes he "got nervous and threw it down on the floor." Def.'s Supplemental Post-Verdict Mots., Ex. A.

2. Testimony of Victor Jones

Jones testified that he was a close friend of Cephas and Gant, and that he knew Kelly as a result of his friendship with Cephas. 2006 Hr'g Tr. 95:12-25, 96:1-7. He explained that Café Breezes was the "hang-out spot" for the four of them during some period of time before Kelly's arrest. *Id.* at 97:3-6.

Jones was at Café Breezes during the early morning hours of May 1, 2004, "trying to get [him]self together" after spending a "couple hours, maybe two hours," drinking. *Id.* at 98:6-9, 118:17-20-22. He admitted that he "was drunk and the room was spinning." *Id.* at 122:16-21. At some time "past midnight," he became aware that the police had entered Café Breezes because there was some "commotion." *Id.* at 98:16-18, 101:21-25, 102:1-3. At the time the police entered, Jones had his elbow on the bar and was sitting next to Kelly. *Id.* at 100:1-5, 119:20-24. According to Jones, "all the seats were filled. There were some, there was people standing in between the seats, there was people standing behind me. I didn't know the person who was sitting next to me [on the right side]." *Id.* at 100:18-23.

Jones testified that after he noticed the police in the bar, the following sequence of events occurred:

> There was a little bit of pushing, somebody pushed my shoulder, kind of like my back but people were brushing into me all night. Somebody brushed into me and somebody put something in my lap and it was a gun. And I pushed it off of my lap onto the floor.

Id. at 102:7-13. Jones then clarified that the weight of the gun "landed . . . in [his] crotch area." *Id.* at 103:1-2. Jones initially said he was unsure about whether the gun had been dropped onto

his lap from his right or left side, but finally said the gun came "from probably the right side of me, more so than the left side of me." *Id.* at 102:23-25, 103:7-8, 119:20-24. Jones "instantly recognized it was a gun" and "immediately pushed it off [his] lap."[1] *Id.* at 103:3-4, 120:4-5. Jones did not recall the exact direction in which he pushed the gun. *Id.* at 103:5-8, 132:22-25. He assumed that because he pushed the gun with his left hand, which is dominant, the gun fell in front of him and slightly to the left. *Id.* at 121:2-10. The gun "made a sound of hitting wood and it also made a sound hitting the floor" as it first hit the wooden bar and then the tile floor. *Id.* at 118:1-4, 122:7-8. When Jones turned around to spot the person who had dropped the gun into his lap, he "didn't perceive" "a facial reaction like acknowledgment that somebody did it." *Id.* at 123:19-21, 124:1-3.

Jones testified that he watched the police seize the gun from the floor and arrest Kelly for possessing the gun that he, Jones, had pushed onto the floor. *Id.* at 103:9-25, 104:6-9 (testifying that he saw the police seize the gun, that he was "pretty sure" that they picked up the gun he had pushed off his lap, and that he believed Kelly was arrested for possession of the same gun). Jones believed that Kelly "was wrongly arrested," but did not say anything to the officers because he "didn't want to have anything to do with [it]." *Id.* at 106:1-14.

Subsequently, Jones saw Kelly on two or three occasions for "a couple minutes" each time, but they did not discuss the incident on May 1, 2004. *Id.* at 124:16-24, 125:3-5. Jones

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[1] Jones testified that his immediate response to push the gun away was based on a similar previous experience. He explained that when he was about nineteen years old, as he stood outdoors,

> a guy walked up really fast to me and tried to hand me a gun. And when I realized what he was handing me I put my hands up and he handed it to the guy standing right next to me and he was shortly thereafter arrested . . . . I think the other guy got away.

2006 Hr'g Tr. 104:23-25, 105:1-6.

testified that during those times, "I didn't know that he [Kelly] still had a case. When I saw him after that incident I assumed that it was over." *Id.* at 125:16-18. Because Jones observed Kelly "doing his regular thing," Jones "didn't feel a need to discuss [the gun incident]." *Id.* at 125:23-25.

Jones later learned of Kelly's conviction from Gant. *Id.* at 107:5-10, 117:1-5. Jones testified that Gant visited his apartment, and during their conversation, she asked whether he had heard what had happened to Kelly. *Id.* at 109:2-9, 110:1-4. When Jones replied that he did not know what had happened, Gant stated that Kelly was in jail on the gun charge. *Id.* at 110:1-4. Jones responded that Kelly's conviction was "fucked up because [the gun] wasn't his." *Id.* at 110:5-8. When Gant asked how Jones knew that, Jones told Gant "exactly what happened":

> And I told her [Gant] that I was sitting at the bar pretty much next to Jake and when the cops came in, which I didn't really see when the cops came in. I didn't realize that the cops were actually in there behind me until somebody dropped that [gun] in my lap. And once it got dropped in my lap I pushed it off…and that's in fact how I knew it wasn't [Kelly's]. I knew that he didn't do it. And that's pretty much what I told her.

Id. 110:1-8, 117:1-13.

Jones testified that he did not feel comfortable talking with Kelly's girlfriend, Cephas, about the situation. *Id.* at 110:20-25. Cephas instead learned about Jones's statement through Gant and asked Jones to speak to an investigator, but Jones initially refused. *Id.* at 111:13-17. Shortly after, an investigator telephoned Jones and then visited him. *Id.* at 112:5-7. Jones told the investigator that he would refuse to "give a comment" in court if he were subpoenaed and said he "would plead the Fifth" because he "didn't want to discuss it." *Id.* at 112:10-19.

Jones testified, "I really didn't feel comfortable doing this [i.e., testifying] and I didn't really want to involve myself," *id.* at 113:20-21, but "I just felt that it probably was the right

thing to do," and "[t]he more I thought about it, the more I felt that I really didn't have anything to hide so I decided to say exactly what happened," *id.* at 126:7-12.

3. Testimony of Philadelphia Police Officer Clarence Clark

Philadelphia Police Officer Clarence Clark, a member of the Vice Squad, testified that he entered Café Breezes with Officer Fairbanks on an undercover operation at approximately midnight or 1:00 a.m. on May 1, 2004. *Id.* at 136:11-19, 137:2-12. Clark sat down on a bar stool directly to the right of Jones and ordered a beer. *Id.* at 137:22-24, 138:25, 139:1-2. After some time passed, Clark notified his supervisor to come to Café Breezes. *Id.* at 140:8-11. His supervisor, Drummond, arrived and announced that he and members of the Vice Squad would "do open inspection on the bar." *Id.* at 140:22-25. Clark testified that there was no one standing behind him or the person to his left — Jones — when the police entered. *Id.* at 141:1-6. Clark, who was seated next to Jones, two seats away from Kelly, denied hearing a gun drop to the floor at any point, including immediately before Officer Stewart yelled "gun." *Id.* at 141:7-10, 143:13-16.

C. District Court Order Granting in Part Kelly's Motion for New Trial

Based on that new evidence, on August 29, 2006, this Court granted Kelly's Motion for New Trial on the ground that Kelly had met his burden of establishing the requirements under Federal Rule of Criminal Procedure 33(b)(1) for a new trial based on newly discovered evidence — the prospective testimony of Victor Jones.[2] The Court concluded that Kelly had established all five elements of the test laid out in *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976), for granting a new trial on the basis of newly discovered evidence: (1) the evidence was in

[2] This Court dismissed without prejudice Kelly's claim of ineffective assistance of counsel and denied the claims that the verdict was against the weight of the evidence and that the Court erred in its evidentiary ruling.

fact newly discovered since trial; (2) the defendant was diligent in bringing the evidence before the Court; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material to the issues involved; and (5) the newly discovered evidence would probably produce an acquittal upon a new trial. *United States v. Kelly*, No. 04-605, 2006 WL 2506353 at *10 (E.D. Pa. Aug. 29, 2006).

The Government appealed the new trial order. On August 14, 2008, the Third Circuit reversed and remanded to this Court for entry of judgment of conviction and for sentencing. The Third Circuit concluded that Kelly had not satisfied the diligence prong of the *Iannelli* test, reasoning that Jones's testimony could have been discovered before or at the time of trial with the exercise of reasonable diligence by the defense and that Kelly had made no effort prior to his conviction to speak with Jones about what had happened at Café Breezes the morning of May 1, 2004. *United States v. Kelly*, 539 F.3d 172, 182-83 (3d Cir. 2008). According to the Third Circuit, "such inaction simply does not qualify as reasonable diligence." *Id.* at 183.

The Third Circuit stated the following concerning the failure to investigate Jones in concluding that the defense had not exercised reasonable pretrial diligence:

> Though Kelly may have had no reason to know the exact substance of Jones's potential testimony, he had every reason to question Jones about the gun—which Kelly claimed was not his—and about what he may have witnessed the morning of Kelly's arrest. As the Government points out in its brief, Jones may have been able to provide Kelly with evidence to corroborate his theory that "someone threw the gun at [him]." Kelly could have asked Jones if he saw who threw the gun at him or from what direction it was thrown; he could have asked Jones if he saw someone with a gun earlier that night or heard people talking about the incident after his arrest. And while there is always the possibility that Jones would have been unable—or unwilling—to provide Kelly with the answers to these questions, we will never know *because Kelly never asked them*. Any potential or anticipated futility in doing so—without more—does not excuse Kelly from his duty to exercise reasonable diligence before trial.

Id. at 184. The Third Circuit determined that "sitting on one's hands and waiting for a known eyewitness to come forward with potentially exculpatory information" is not reasonable diligence, and Kelly was thus not entitled to a new trial. *Id.* at 186-87.

On remand, this Court sentenced Kelly, *inter alia*, to the mandatory minimum sentence of 180 months imprisonment. Kelly appealed his conviction and sentence to the Third Circuit, which affirmed the judgment on January 20, 2011.

D. Kelly's Habeas Motion under 28 U.S.C. § 2255

Kelly filed the pending Motion to Vacate, Set Aside or Correct a Sentence pursuant to 28 U.S.C. § 2255 ("§ 2255 Motion") on April 16, 2012. On August 8, 2014, the Court held an evidentiary hearing on the first three claims presented in Kelly's § 2255 Motion. Both trial counsel and Kelly testified.

1. Testimony of Trial Counsel

Trial counsel testified that he had hired Wayne Schmidt to investigate Kelly's case prior to trial. Hr'g Tr. Aug. 8, 2014 ("2014 Hr'g Tr.") 21:6-10. Trial counsel did not recall Kelly giving him the names of any potential witnesses, but he assumed that Kelly had given him the witness names listed in Schmidt's investigative report. *See id.* at 20:22-25, 21:1-4 ("Q: Do you remember the names of anybody that he [Kelly] told you? A: . . . I mean, off the top of my head, no. In referencing the file that you showed me, I saw that my investigator was given names and researched names . . . so I would assume . . . that those names and information came from Mr. Kelly to me to my investigator."). The case file sent to Cedrone, counsel representing Kelly in post-trial proceedings, from trial counsel's office contained no notes of meetings between trial counsel and Kelly or any notes at all. *Id.* at 15:1-8. Of that absence of notes, trial counsel stated "what this says to me, seeing that there's not a single page written by me, it was probably

removed prior to turning over to counsel." *Id.* at 15:5-8. Trial counsel stated that in the approximately ten months he represented Kelly, "there were a number of [meetings with Kelly]" but "obviously I can't tell you how many." *Id.* at 20:12-15. The investigative report that trial counsel's investigator prepared was dated July 14, 2005—five days before the start of trial. *Id.* at 21:11-16.

Trial counsel testified that all of the names he was given by Kelly would have been on the investigative report. Three individuals—Imean Collier, Tonya Davis, and Sharon Mobley—were reached successfully. *Id.* at 21:17-25, 22:1-7. The investigator left messages for a man named Bo but with negative results. *Id.* at 22:8-10. The investigator also took photographs of Kelly at Café Breezes. *Id.* at 72:2-8. Victor Jones's name did not appear in the investigative report, and trial counsel testified that Kelly did not tell him that Jones was a potential witness. *Id.* at 23:9-14.

2. Testimony of Jake Kelly

Kelly testified that prior to trial he told trial counsel that a man named "Vic Dimone" was sitting to his right at Café Breezes the morning of his arrest on May 1, 2004, as were two female patrons to his left. *Id.* at 64:14-16, 65:17-20. Kelly said Victor Jones had been introduced to him as "Vic Dimone," and that was why he gave trial counsel that name. *Id.* at 56:6-10. Kelly recalled that he gave trial counsel the names of several patrons from the bar that night as an investigatory starting point, including Tonya Davis, Sharon Mobley, Mike Starr, Bo, Slim, Imen Collier, and Vic Dimone. *Id.* at 64:14-20.

Kelly testified that, after he retained trial counsel, he met with him twice before trial, *id.* at 67:25, 68:1-2, but stated "after I paid [trial counsel], it took me forever to get in touch with him. He would never return my phone calls," *id.* at 64:2-4. In frustration, Kelly went to another

attorney "to ask him can he represent me, because [trial counsel] don't ever recall no phone calls. And I believe what he must have did was got in touch with [trial counsel], then [trial counsel] finally called me back." *Id.* at 64:5-10. Kelly testified that he was never shown a copy of the investigative report in his case and thus had no opportunity to discuss with trial counsel why individuals, including Jones, did not appear on the report. *Id.* at 82:1-12.

At trial, trial counsel called no witnesses for the defense. When asked why he did not question trial counsel about why Jones was not called as a witness, "I figured [trial counsel] knew what he was doing because he's the lawyer. I figured he didn't want to call him for a certain reason or something." *Id.* at 79:1-3. On the second day of trial, Kelly testified that trial counsel "said can you get these witnesses to come to court tomorrow and I didn't have nobody phone number, nobody address. I'm like, how am I going to get in touch with these people." *Id.* at 83:1-5.

II. APPLICABLE LAW

Ineffective assistance of counsel claims are analyzed in two parts. "First, the defendant must show that counsel's performance was deficient," meaning that it "fell below an objective standard of reasonableness" under all the circumstances, including "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). "Second, the defendant must show that [counsel's] deficient performance prejudiced the defense," which requires the defendant to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 687, 694.

"The effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (citing *Strickland*, 466 U.S. at 696).

III. DISCUSSION

The Court first discusses the performance prong of *Strickland* before analyzing the prejudice prong of *Strickland*. As stated above, Kelly must show both deficient performance and prejudice in order to succeed on his habeas motion.

A. *Strickland*'s First Prong – Performance

Kelly alleges ineffective assistance of counsel based on trial counsel's failure to conduct an adequate investigation, including trial counsel's failure to interview Victor Johnson. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690. "The

reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. "Only choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." *Rolan v. Vaughn*, 445 F.3d 671, 681 (3d Cir. 2006) (quoting *Strickland*, 466 U.S. at 690-91).

"While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he has cause to do so, in order to provide minimally competent professional representation." *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997). "[T]he issue in the present case is whether, under all of the circumstances, trial counsel acted reasonably in deciding not to interview [an eyewitness]." *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3d Cir. 1990) (Alito, J.).

Trial counsel has a duty to investigate evidence related to the defensive strategy he or she pursues at trial. *Jacobs v. Horn*, 395 F.3d 92, 104 (3d Cir. 2005). In *Jacobs*, the Third Circuit addressed whether trial counsel was ineffective in a state case for failing to further investigate a defendant's mental health for a diminished capacity defense. *Id.* at 101. Trial counsel consulted with a psychiatrist prior to trial who performed a mental health evaluation of the defendant. *Id.* at 98. Trial counsel did not inform the psychiatrist that the defendant was subject to the death penalty or provide materials concerning the defendant's background. *Id.* Following the psychiatrist's evaluation, the psychiatrist orally reported to trial counsel that he found no evidence that defendant had a major mental illness, *id.*, and trial counsel conducted no additional investigation into defendant's mental health. *Id.* at 102. Trial counsel nonetheless pursued a diminished capacity defense at trial. *Id.* at 101. That defense was unsuccessful and the defendant was convicted of first-degree murder. *Id.* at 98.

Subsequent evaluation of the defendant in *Jacobs* revealed that he suffered from a number of mental health deficits. *Id.* at 101. In a petition under 28 U.S.C. § 2254, the defendant raised a claim of ineffective assistance of trial counsel based on trial counsel's incomplete investigation of his mental health. *Id.* at 98-99. The District Court concluded that trial counsel's performance was not deficient in that regard and thus denied his claim. *Id.* at 103. The Third Circuit reversed, concluding that trial counsel's choice "not to investigate further, although he presented the diminished capacity defense at trial," *id.*, established that trial counsel "failed to exercise reasonable professional judgment," *id.* at 104. In reaching that conclusion, the Third Circuit emphasized that there was a significant difference between a determination of whether counsel "was ineffective in deciding not to investigate more extensively before making a strategic choice not to present a diminished capacity defense at all" and whether "counsel was ineffective by failing to investigate and discover evidence to support the defense he pursued." *Id.* As the Court stated in reversing the District Court's denial of petitioner's ineffective assistance claim, "[c]ounsel's failure to investigate adequately and discover evidence to support his strategy of choice is an entirely different question." *Id.*[3]

The Court faces a similar scenario in this case. Trial counsel's theory of the case revolved around the weapon belonging to someone seated around Kelly. As the Third Circuit stated when discussing the failure to interview Jones, "[c]onsidering all of the circumstances surrounding this case, the fact that Kelly did not even attempt to question Jones—or have Jones questioned—prior to his trial is both shocking and inexcusable." *Kelly*, 539 F.3d at 186. But this Court credits Kelly's testimony at the evidentiary hearing that Kelly did in fact attempt to have Jones questioned. In making that determination, the Court notes that, on a number of occasions during

[3] The Court observes that this is a capital case but concludes that the reasoning is instructive in this context as well.

the 2014 hearing, trial counsel testified that he did not recall Kelly giving him the names of any potential witnesses but assumed that the witnesses listed in the investigative report were given to him by Kelly, 2014 Hr'g Tr. at 20:22-25, 21:1-4, and that any name given to him would be included in the investigative report, *id.* at 24:5-14.[4]

Kelly identified Jones as Vic Dimone—the name by which Kelly knew Jones—to his trial counsel and stated that Jones was seated to his immediate right. Trial counsel knew that Kelly told officers immediately after his arrest that the gun did not belong to him and somebody must have thrown it at him. Trial counsel advanced that theory in both his opening and closing statements.

In his opening statement, trial counsel stated to the jury: "Officer doesn't know whose [the gun] is, there's two girls, another guy and Jake Kelly there. It's probably closest to Jake Kelly so, boom, Jake Kelly becomes the one [who] has the gun and that's why we're all here today." Trial Tr. 7/20/05 at 27:9-12. In his closing statement, trial counsel expounded on that theory, stating:

> What I suggest to you happened is that in the confusion and chaos of 20 officers coming into a small bar and announcing whatever announcements that were made, that a gun was in fact dropped somewhere in this area, and that in fact Officer Stewart did in fact find it on the floor . . . . It could be the two girls', it could be the other guy's, it could be anybody's . . . . And I've got to be candid with you, I'm not unmindful of how Jake Kelly looks. He kind of looks like a criminal sometimes.

Id. at 35:22-25, 36:1-12.[5]

[4] Trial counsel later testified that Kelly did not tell him Jones was a potential witness. 2014 Hr'g Tr. at 23:9-14.

[5] The Court notes that "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). In referring to trial counsel's opening and closing statements, the Court only seeks to emphasize the importance of eyewitness testimony in this case based on the theory presented to the jury and Kelly's own statements.

Yet—as the Third Circuit observed in holding that Kelly failed to exercise pre-trial diligence and was therefore not entitled to a new trial—trial counsel still made no effort to locate Jones. Trial counsel failed to interview individuals beyond the list of names provided by Kelly and did not even interview all of the individuals that Kelly named. Kelly provided additional testimony at the hearing on his § 2255 Motion, which the Court credits, that he had a difficult time reaching trial counsel, that trial counsel and Schmidt had never shown him a list of persons they interviewed, and that trial counsel asked Kelly on the second day of trial if he could get any witnesses in to testify.

The Government makes two arguments in response to Kelly's claim that his trial counsel was ineffective: (1) that Kelly's participation in his defense defeats his argument that counsel was ineffective, and (2) that Kelly's previous filings reveal that Kelly did not provided Jones's name to trial counsel prior to trial. The Court addresses each argument in turn.

The Government argues that Kelly's participation in his defense undermines his argument that trial counsel was ineffective. However, Kelly's participation in his defense does not absolve trial counsel of his duty to adequately represent his client. Moreover, the Court credits Kelly's testimony that he gave Jones's pseudonym to trial counsel and identified him as one of the people seated next to Kelly.

The Government also argues that Kelly's previous filings suggest that "he did not advise trial counsel of Jones as a potential witness pre-trial." Gov't Supp. Mem. 27. In support of this argument, the Government contends that (1) "[i]n his motion for a new trial, Kelly claimed that he only 'recently came into possession of evidence that Victor Jones possessed the gun and threw it in his direction'" and (2) Kelly only stated that he informed trial counsel of Imean Collier, Tonya Davis, and Sharon Moble in his § 2255 Motion but did not state that he provided

trial counsel with the name of Vic Dimone. Gov't Supp. Mem. 27-28.

As to the Government's first contention, Kelly's statement that he only "recently came into possession of evidence that Victor Jones possessed the gun and threw it in his direction," is consistent with Kelly providing the name "Vic Dimone" to trial counsel prior to trial. Kelly does not argue that trial counsel should have known that Jones threw the gun. Instead, Kelly argues that, given the facts of this case and the defense theory that the weapon belonged to someone else, trial counsel should have attempted to interview the identified witness who was seated next to Kelly and was central to the defense's theory.

As to the Government's contention that Kelly did not inform trial counsel of Jones because he was not one of the three witnesses named in Kelly's § 2255 Motion, the Motion states that Kelly provided a number of names of potential witnesses to trial counsel and that "[t]hese individuals *included, at least,* Imean Collier, Tonya Davis, Sharon Moble." § 2255 Mot. 6 (emphasis added). However, the investigative report reflects that Kelly provided at least one additional name to trial counsel, indicating that the list provided in the § 2255 Motion was not exhaustive. Furthermore, Kelly testified that he provided trial counsel with several additional names including Bo, Mike Starr, and Vic Dimone [Jones]. As previously stated, the Court credits that testimony.

As the Government states in its response to Kelly's § 2255 Motion, it is an "undisputed fact . . . that: (1) Jones was plainly an important potential witness (Jones was sitting next to Kelly when the gun was dropped)." Gov't Resp. at 16. The Court recognizes that it must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. However, even prior to Jones's exculpatory statement, it

was clear that Jones was an eyewitness who potentially possessed valuable information related to Kelly's defense theory. *See McGahee v. United States*, 570 F. Supp. 2d 723, 732 (E.D. Pa. 2008) (observing that "failing to investigate an eye-witness raises greater concerns than failing to investigate a possible character witness").

The Court cannot identify a reasonable decision or professional judgment that made investigation of Jones unnecessary by trial counsel. The investigative report prepared for the defense, which was dated five days before trial, provides no additional information on the matter, and the case file transferred from trial counsel to subsequent counsel contained no notes prepared by trial counsel. The Court credits Kelly's testimony that he gave trial counsel the name "Vic Dimone" and identified him as sitting next to Kelly, and concludes that trial counsel did not make a reasonable decision that made investigation of Jones unnecessary.

The Court would be of the same opinion even if it had not credited Kelly's testimony that he provided the name "Vic Dimone" to trial counsel. The defense theory was based on the weapon belonging to someone seated around Kelly. Trial counsel was aware that a man was sitting to Kelly's right and made reference to him during both the opening and in closing argument. At the least, trial counsel knew that the man was a crucial eyewitness to the events. In those circumstances, the Court cannot identify a reasonable decision or professional judgment that made investigation of the man unnecessary. In short, even if Kelly had not provided Jones's pseudonym to trial counsel, trial counsel was required to attempt to identify and interview him under the circumstances of this case, and he did not do so.

This case presents a unique set of facts, where eyewitness testimony was key to the defense theory presented to the jury. The Court accords "a heavy measure of deference to [trial] counsel's judgments" but concludes that this is the relatively rare case where trial counsel's

performance "fell below an objective standard of reasonableness." But, because "the fact that counsel was ineffective is not in itself sufficient to grant relief under *Strickland*," *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989), this Court must next determine if Kelly has met *Strickland*'s second prong.

B. *Strickland*'s Second Prong - Prejudice

As stated, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 111.

"When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In making the determination, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

The Court first notes that the Government's case at trial, linking Kelly to the weapon, was limited to the testimony of Officer Stewart. The Government did not produce bar patron eyewitnesses or forensic evidence to establish that Kelly possessed the weapon, and several aspects of Stewart's testimony were inconsistent with other testimony and evidence. First, Stewart did not record her observations about Kelly's nervous conduct, including profuse sweating and fidgeting, in her reports immediately after the arrest, nor did she mention them in her testimony prior to trial. Second, although Stewart stated that she made her safety concerns

about Kelly known to Officer Miles during the inspection prior to seeing the weapon, Miles did not recall any such conversation. Third, Stewart did not see a weapon in Kelly's lap when she repositioned herself behind him for a period almost immediately preceding his arrest. Fourth, Stewart testified that Kelly volunteered his identification unnecessarily, drawing attention back to him while he allegedly had a weapon in his lap. The only corroboration provided at trial for Stewart's version of the events was Miles's testimony that he heard a "thud," at some point before Stewart said the weapon fell to the floor with "a loud metal clang." However, Miles admitted that he never revealed that information to anyone prior to his testimony at trial.

At trial, those aspects of Stewart's testimony were offset only by the defense's theory that the weapon belonged to someone else and had been thrown over to Kelly's area. At this stage, the Court must consider whether Jones's testimony is credible, and the totality of the evidence before the jury, in deciding whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The Government raises four main points concerning Jones's credibility and the Court assesses each in turn. First, the Government observes that Jones was admittedly intoxicated at the time of these events. While Jones may have been intoxicated, the Court finds nothing in his testimony to indicate that his perception of the relevant events was impacted in a manner that undermines his credibility. Second, the Government contends that Jones's testimony at the hearing, specifically that a third party dropped the weapon into Jones's lap, absolved both Kelly and Jones of criminal responsibility. Although that is true, the Court will not penalize Kelly for an exculpatory witness that may absolve both Jones and Kelly of criminal liability. This Court's task on habeas review is not to find an individual to hold responsible for the violation. Instead, the Court's task is to assess the credibility of Jones and the totality of the evidence against Kelly

to reach a determination on the prejudice prong of *Strickland*. While the Court will consider this aspect of Jones's story when it reaches credibility issues concerning his differing accounts of events, the mere fact that Jones's testimony absolves both Jones and Kelly of criminal liability does not alter the Court's determination.

Third, the Government raises an inconsistency between Jones's testimony and his earlier alleged statement to Gant that "he had the gun and threw it on the floor" of the bar when the police entered because he was nervous. 2006 Hr'g 29:21-23, 52:3-10. In his testimony, Jones stated that the gun was dropped into his lap by someone standing behind him and he immediately brushed it off. *Id.* at 102:7-13. Officer Clark testified at the hearing that there was no one standing behind Jones when the police entered the bar. *Id.* at 141:1-6. Those inconsistencies in Jones's statements, raised by the Government, bear on the question whether the weapon was Jones's weapon originally, not whether he pushed or threw it onto the bar floor near Kelly. That aspect of Jones's testimony has remained consistent. A jury could choose not to credit Jones's testimony concerning how the weapon came into his possession, while still crediting his testimony regarding his disposal of the weapon. The Court does so here.

Fourth, the Government contends that a jury would have to disbelieve the testimony of Stewart in order to credit Jones's testimony. In support of this argument, the Government provides Stewart's statement that the "gun fell from [Kelly's] lap" on his left side, Trial Tr. 7/20/05 at 78:1-4, and Miles's statement that he heard a "thud," *id.* at 160:16-19. The Government states under Jones's version of events, the weapon would have fallen to Kelly's right, not his left, and there would have been no "thud." However, the placement of the gun as it fell is based solely on Stewart's testimony, and Stewart recovered the weapon from the floor. In addition, as to Miles's testimony concerning a "thud," he (1) testified that he had not mentioned

this detail before his trial testimony, and (2) Jones testified that the gun made "a sound of hitting wood and it also make a sound hitting the floor" when he brushed it off his lap, 2006 Hr'g 122:7-8.

Stewart's testimony was previously offered at trial in a vacuum, devoid of any evidence corroborating Kelly's theory that someone threw the weapon into his area. The introduction of Jones's testimony would have provided valuable corroboration of Kelly's defense theory, disputing Stewart's statement that she saw the gun fall from Kelly's lap. *Cf. Caldwell v. Lewis*, 414 F. App'x 809, 818 (6th Cir. 2011) ("[T]his Court has recognized that when trial counsel fails to present an alibi witness, the difference between the case that was and the case that should have been is undeniable.").[6]

Finally, the Government contends that Jones "has a strong bias in favor of Kelly and thus a strong motive to lie in this case." Gov't Supp. Mem. 25. The Court finds this argument unavailing. While Jones is a close friend of Cephas, Kelly's girlfriend, and testified to knowing Kelly through his friendship with Cephas, 2006 Hr'g 95:12-25, 96:1-7, there is no evidence in the record that indicates Jones "has a strong bias in favor of Kelly." Rather, Jones testified that he did not feel comfortable discussing the incident with Cephas, *id.* at 110:20-25, that he initially refused to speak with an investigator for Kelly, *id.* at 111:13-17, and that he informed the investigator that he would refuse to "give a comment" in court if he were subpoenaed and said he "would plead the Fifth" because he "didn't want to discuss it," *id.* at 112:10-19. Jones's

[6] The Court notes that a jury may be instructed that "[t]he fact that a witness is employed as a law enforcement officer does not mean that his or her testimony necessarily deserves more or less consideration or greater or lesser weight than that of any other witness." United States Court of Appeals for the Third Circuit, *Criminal Model Jury Instructions* 4.18 (Credibility of Witnesses - Law Enforcement Officer).

reluctance to come forward as a witness belies the Government's argument that Jones has a strong motive to lie for Kelly.

The Court in previously ruling on Kelly's 2255 Motion determined that Kelly had failed to show prejudice. Upon further deliberation in accordance with the Third Circuit's direction on remand, and after consideration of the totality of the evidence presented to the jury at trial and the subsequent testimony by Jones, the Court concludes that Kelly has shown "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 694.

IV. CONCLUSION

For the foregoing reasons, the Court grants Kelly's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, vacates his conviction and sentence, and orders a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	**CRIMINAL ACTION**
v.	
JAKE KELLY	**NO. 04-605**

O R D E R

AND NOW, this 27th day of July, 2017, upon consideration of the Motion to Vacate, Set Aside or Correct a Sentence under 28 U.S.C. § 2255 (Doc. No. 155, filed Apr. 16, 2012), Government's Response to Petitioner's Motion under 28 U.S.C. § 2255 (Doc. No. 168, filed Oct. 15, 2012), Petitioner Jake Kelly's Reply to Government's Response to Petitioner's Motion under 28 U.S.C. § 2255 (Doc. No. 173, filed Nov. 21, 2012), Supplemental Memorandum in Support of § 2255 Motion (Doc. No. 201, filed Jan. 30, 2017), and Government's Supplemental Memorandum in Opposition of Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 204, filed June 29, 2017), following an evidentiary hearing held on August 8, 2014, for the reasons stated in the accompanying Memorandum dated July 27, 2017, **IT IS ORDERED** that the Motion to Vacate, Set Aside, or Correct a Sentence under 29 U.S.C. § 2255 is **GRANTED**. Defendant's conviction and sentence are **VACATED**, and a new trial is **GRANTED**.

IT IS FURTHER ORDERED that a telephone conference for the purpose of scheduling further proceedings will be conducted in due course.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.